THE LAW REPORTER.

SEPTEMBER, 1841.

CASE OF ALEXANDER McLEOD.

THE DECISION OF THE SUPREME COURT OF NEW YORK.

In our last number we alluded briefly to this great national case, and the extraordinary judgment pronounced in it by the supreme court of the state of New York; which, we then thought, as a legal performance, was open to criticism, and, we feared, would not be entirely creditable to the country abroad. We regret to be obliged to say, with all that respect which is due to a high judicial tribunal of a great state of the Union, that a farther examination of the opinion given by the court has not tended to change the views which we then took of it. In regard to foreign nations, we must add, that if their governments had previously any grounds for entertaining a distrust of our state courts in dealing with great questions of *international* law — which, for the most part, lie beyond the sphere of their ordinary action — those governments, we are apprehensive, will not find new inducements, in the present decision, to lead them to place any greater confidence in those local tribunals, than heretofore. Even considering our state courts as tribunals administering the comparatively insignificant regulations of common municipal law, what estimate will English lawyers be likely to form of the legal learning of our highest state courts, and what confidence will they place in that learning, when they find a court of that rank, in reviewing the catalogue of principal cases, respecting admission to bail, to be apparently quite unimformed of a well known law authority, in which a principal case is reported. The New York court, in the present case, after observing, that the com-

piler, Petersdorf, refers to Chitty, and that this latter cites "*Cases K. B.* 96," gravely remark — "this book, eo nomine, *does not appear now to be extant*; (!) and 12 Mod., the only reference I am aware of, which among the English quotations is synonymous with Chitty's, does not appear to contain the case stated by him." The book in question, however, which the court says does not appear now to be extant, is familiarly known to all criminal lawyers in this part of the United States, if not to all practisers on the civil side, as *Cunningham's Reports*, though it is not always cited as his, (from the circumstance of his name not being in the title page), but in the manner adopted by Chitty, or, sometimes, as *Rep. Temp. Hardwicke*, the later editions of which, however, do not contain *all* the cases to be found in Cunningham's original edition, of 1766. The volume in question may be seen in the Bar Library of Boston, (where the case cited by Chitty may be found, *Rex* v. *Parnam*, page 96), and we presume, also, in every other well furnished law library in the United States.

In ordinary cases, we should not have deemed this matter deserving of so particular notice; but in a case involving the life of the individual accused, and, what is of immeasurably greater consequence, involving the question of peace or war to the millions of human beings in our own country and in England, such an omission can hardly be excused. But we proceed to the case before us; making an abridged history of its origin from the *Monthly Chronicle* of May, 1841, a valuable periodical, now well known to be under the charge of the editor of the Boston Daily Advertiser, whose circumspection and accuracy are familiar to every reader.

In December, 1837, on the defeat of the party in Upper Canada, who had taken up arms against the colonial government, William Lyon Mackenzie and Dr. Rolf, two principal leaders of the insurrection, made their escape to the state of New York. They immediately proceeded to the city of Buffalo, where a strong popular feeling had been manifested in favor of the insurrection. There, after two or three preliminary meetings, a large popular assembly was held on the 12th of December, at the theatre, where were assembled two thousand people, and large numbers were unable to gain admittance to the theatre for want of room. Mackenzie was present, and made a speech, recounting his exploits, and strongly exciting the feelings of the assembly against the British authorities. The speech was received with bursts of applause; and resolutions were entered into, to aid the cause of the colonial insurrection by encouraging the enlistment of men and by contributions in money. Shortly afterwards a party was organized, consisting partly of refugee Canadians, but chiefly of Americans, for the invasion of the province. As they could not openly embody themselves in the United States, and were too feeble to maintain a position in Canada within reach of the military force embodied there, they adopted the expedient of taking possession of *Navy Island*, a small uninhabited island in Niagara river, *belonging to Canada*, and

situated a few miles above Niagara Falls. It is only half a mile from the Canada shore, but is in a great measure secured from invasion, from this quarter, by the rapidity of the current; yet it is easily accessible by boats and vessels from the *American* shore. Here a provisional government was established, and Mackenzie was placed at its head. Rensselaer van Rensselaer, an American citizen from Albany, was appointed military commander. Proclamations were issued, inviting the discontented to flock to the standard of Canadian liberty, and offering rewards, for military services, in lands to be conquered in Canada. Paper money was issued, redeemable from the resources of the government when it should require any, and in this medium purchases were made of munitions of war, and provisions for the rapidly increasing army, except so far as these were not gratuitously furnished. Batteries were erected, in which cannon, *stolen from the arsenals of New York*, were mounted, for the defence of the island, and for bombarding the town of Chippewa on the opposite shore. The force on the island increased so rapidly, that they talked loudly of crossing over to the neighboring continent; and the colonial governor assembled a body of volunteer militia at Chippewa, under Colonel McNab, for the defence of the colony, with threats of making a hostile descent upon the island.

By the 20th of December, the adventurers were reported at seven or eight hundred men, with twelve or fifteen cannon — the state arsenal of New York was entered, and five hundred stand of arms and several pieces of ordnance stolen from it. On the other hand, a body of two hundred colonial volunteers was stationed in Chippewa, (opposite to the island) which had been evacuated by the inhabitants; and a cannonading was commenced from the island, to the great alarm of the colonists. The provincial force was augmented in Chippewa, rumors were current, that an attack upon the islanders was meditated, and that they meditated a descent upon the Canadian territory. In the mean time, very little effort had been used by the authorities of New York, to prevent this invasion of that province or the plunder of the state arsenals; the government of the United States, however, by Mr. Forsyth, secretary of state, gave instructions to their law officer in that quarter, to prosecute for any violations of law; and it was stated, that the marshal of the United States met a party of men marching towards Navy Island with a field piece, but that *he had no power to stop it.*

During this time, a constant intercourse was kept up between the Navy Islanders and the American shore; and, to facilitate this, as well as to derive a revenue from the crowds of people flocking to the island, a steamboat, called the *Caroline*, belonging to William Wells, of Buffalo, and commanded by captain Appleby, was employed as a regular passage boat between the island and the American port of *Schlosser*, nearly opposite, a few miles above Niagara Falls. She was cut out of the ice and put in a condition for this service; of which

the Canadian commander, Colonel McNab, had notice, and promptly resolved to destroy her. On the 29th, this steamer proceeded down to Navy Island, and thence passed over to Schlosser, where she arrived at 3 o'clock, P. M. She afterwards made two trips to the island and back, on the same afternoon, carrying passengers, at twenty-five cents each, and, as alleged by the British officers, carrying also munitions of war and a cannon for the use of the invaders. She was moored to the wharf at night, and in addition to the crew, ten in number, who slept on board, several persons who had resorted to Schlosser from curiosity or other motives, went on board to lodge, and retired to rest in the cabin. One of the crew kept watch on deck, who at midnight gave the alarm that boats were approaching from the opposite, Canadian, shore; and, by the time that the unarmed crew and lodgers were aroused from sleep, the steamer was boarded by a party of armed men, who drove them on shore; the boat was towed out from the harbor, set on fire, and suffered to drift down the river over the cataract of the Niagara. One man, *Amos Durfee*, a citizen of Buffalo, was found dead on the wharf, shot through the head by a musket ball, and three men were wounded by blows from the assailants. It was at first currently reported, that there were several persons on board the steamer when she went over the falls; but it did not appear, from subsequent proof, that any person was missing. Colonel McNab reported the exploit to Lieutenant Governor Head, *as performed under his orders*, in the most gallant manner, by Captain Drew, of the royal navy, with a party of volunteers.

The sensation and alarm excited on this occasion are well known. The president of the United States issued a proclamation, reciting this violation of the public peace, and that "a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States;" and he earnestly exhorted all citizens, who had thus violated their duties, to return to their homes; warning them, that in thus compromitting the *neutrality* of the government, they would render themselves liable to punishment, and would receive no aid or countenance from their government. General Scott, of the United States army, and Governor Marcy, of New York, repaired to Buffalo on the 10th of January; Mackenzie, the head of the island government, and General Van Rensselaer, having come over to Buffalo, were arrested by the United States marshal; the island was finally evacuated, and the British flag hoisted on it.

We have given this particular history of the affair, for the purpose of putting the reader in possession of all the material circumstances, which would be taken into view in settling this case as a diplomatic, or international question, and as a purely legal one; for, whatever may be the decision of a *judicial* tribunal on such questions as may be technically presented to it in cases of this nature, the great ques-

tion, after all, in which the American people are interested, and on which they would be most anxious to form a sound opinion, is one of *international* law.

We will now proceed to consider, as briefly as possible, the questions that have arisen in this important case — questions of as great magnitude, as have ever come before any judicial tribunal in our country since the adoption of the Federal constitution.

It appears by the foregoing statement, that, in the attack, which was made by the party of volunteers, under orders from the British officer, Col. McNab, upon the American steamer Caroline, while lying in the American port of Schlosser, one man, *Amos Durfee*, a citizen of Buffalo, was killed,—that subsequently *Alexander McLeod*, a British subject, having come within the territory of the state of New York, was arrested under process issued by the state authorities, on a charge of having been one of the party that attacked the Caroline, and of having killed Durfee. An indictment, for murder, was accordingly found by the grand jury of the county against McLeod, who was held to answer to it, and was kept a prisoner in the common jail, as in ordinary cases, for an offence under the municipal laws, considered to be not bailable. Not being able to obtain his enlargement, on bail, he made application to the court for his discharge, on a *habeas corpus*.

The question, then, which was submitted to the state court, was — whether he was entitled to his discharge on that process, under the circumstances of the case.

This general question is to be considered under different points of view; as a purely technical question under the municipal laws of New York, which it was in its origin, and as a question of international law, which it became by the accession of new elements subsequently to the first institution of the proceedings; then, again, its international character is to be considered in relation to the peculiar organization and powers of the government of the *Union*, and the *state* governments respectively. The reader will at once perceive, therefore, that this question is not to be settled upon the narrow principles and technical rules of municipal law, which are sufficient for the decision of the ordinary controversies between fellow-subjects of the same sovereign state, living under the influence of the same local institutions, usages and habits; but that it must be decided by those more large and liberal rules of *justice*, which are sufficiently generalized to be admitted as binding on all nations, however diversified their local institutions, habits, and usages, who acknowledge the same code of *international law*—in the present case, the international code of the European community, of which the United States are a member. We say, emphatically, the rules of *justice*, and not the rules of *policy*, in its usual application; which last we hope never to see influencing any *judicial* decision, however right it may be deemed in any cases of diplomatic strategy. Even there, however, we would say with the

great British statesman—that *justice* is itself the great standing *policy* of civil society; and any eminent departure from it, *under any circumstances*, lies under the suspicion of being no policy at all."[1] But before the ministers of the holy temple of *Justice*, both friend and foe — nations and individuals — our own country and foreign ones — must bow in submission to the sternest decrees of the divinity, that there rules over the affairs of men — *Tros, Rutulusve fuat, nullo discrimine habebo; Rex Jupiter omnibus idem.*

We have alluded to the relation in which the state governments of our confederacy stand towards the general government; and, lest any suspicion should be harbored of our want of due regard for state rights, we say in the outset, that we yield to no man in asserting them; they must be held sacred; they are the maintaining power of the union, at once the centrifugal and centripetal forces, which keep the members of the system from flying asunder, on the one hand, or, on the other, from dashing together in one common chaos. We are not displeased, therefore, to see a state court manifest a disposition to support what it honestly believes to be the rights of its own state. But, while we would sacredly respect the rights of each state individually, we should, on the other hand, as strenuously maintain the *national* rights, which are secured to *all* the states jointly by the federal constitution. The people of all the states, who constitute the political body called the American *nation*, have *rights* under the solemn compact, which must be respected by every individual state; otherwise, the *nation* cannot perform its *duties* — alike sacred with its *rights* — to each member of the confederacy. If, therefore, we should in the course of our remarks, make different limitations of state rights from those of the New York court, it will proceed from an honest conviction, that such must be the construction of the respective powers of the state and general governments, in order to carry into effect the objects, for which those powers were conferred by the whole people of the United States.

We add one remark farther in relation to the opinions of foreign nations, by their diplomatic agents, on the powers and duties of our judicial and other officers, whether of the states or of the union. We maintain, that the public officers of the United States must, so far as foreign nations are concerned, be the sole judges of the respective powers and duties of the state and general governments. When, therefore, Mr. Fox addresses an official note to the secretary of state in the tone he has adopted, and proceeds to impugn the doctrine of Mr. Forsyth, who asserts "that the federal government of the United States has no power to interfere in the matter in question, and that the decision thereof must rest solely and entirely with the state of New York" — when he assumes such a tone, we say, and goes on to im-

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[1] Burke's Works, Vol. III., page 184.

pugn the construction which is put upon its own powers by the very government to which he is accredited, — whether he is right or wrong in his opinions, — he goes beyond the sphere of his official functions, and commits, what, in the mildest language, would be a marked diplomatic indecorum, and, in some countries, of a less pacific disposition than ours, might have led to other consequences than have here taken place. We make this remark, not in any unfriendly spirit towards the minister himself or the nation he represents, but simply because impartiality demands it.

We will now consider, in detail, the several questions arising in this case. And first, the technical question, whether McLeod was entitled, under the *state* laws to his discharge, on the process of *habeas corpus*; which, if the court had not labored with such an array of learning, we should think might have been disposed of without great difficulty.

The learned judge, who delivered the opinion of the court, states this part of the case thus: "The sheriff returns an indictment for murder, found by a grand jury of that county [Niagara] against the prisoner, in which he appears to have been arraigned at the court of oyer and terminer holden in the same county. It further appears, that he pleaded *not guilty*, and was duly committed for trial. The indictment charges, in the usual form, the murder of Amos Durfee, by the prisoner, on a certain day and at a certain town within the county. These facts, though officially returned by the sheriff, were by a provision in the *habeas corpus* act, (2 Rev. Stat. 471, 2d edit. § 50,) open to a denial by affidavit, or the allegation of any fact to show, that the imprisonment or detention is unlawful. In such case, the same section requires this court to proceed in a summary way, to hear allegations and proofs in support of the imprisonment or detention and dispose of the party, as the justice of the case may require. Under color of complying with this provision, which is of recent introduction, the prisoner, not denying the jurisdiction of the court over the crime as charged in the indictment, or the regularity of the commitment, has interposed an affidavit, stating certain extrinsic facts. One is, that he was absent, and did not at all participate in the alleged offence; the other, that if present and acting, it was in the necessary defence or protection of his country against a treasonable insurrection, of which Durfee was acting in aid at the time." The learned judge then adds — "Taking these facts to be mere matters of evidence upon the issue of not guilty, and of themselves they are clearly nothing more, I am of opinion, that they *are not available on habeas corpus*, even as an argument for letting the prisoner to bail, much less for ordering his unqualified discharge. That this would be so on all the authorities previous to the Revised Statutes, his counsel do not deny."

Notwithstanding this admission, or non-denial on the part of the prisoner's counsel, however, the learned judge goes into an elaborate detail of English cases in support of the doctrine thus laid down by

him respecting bail; including in his enumeration the book before mentioned, cited by Chitty as "Cases, K. B. 96," (supposed to be "not now extant *eo nomine*") and two ancient cases, 2 Str. 911, and 1 Salk. 104, which the court of New York had several years ago condemned "as of little or no weight," in 5 Cow. 39. But it is unnecessary for us to contest the English rule as laid down in the cases that are properly adjudged; for, admitting the English law to be as stated from those books; still, that whole class of cases appears to us to be inapplicable, or aside of the true question in the case before the court. All those cases assume as their basis, that the party applying for bail is confessedly liable to be *tried;* and the question upon his application then is, not whether he shall take his trial at all — for it is already settled that he shall — but whether he shall, for his personal accommodation, be allowed his liberty on bail, till his day of trial arrives. The actual imprisonment is not imposed as a punishment, but merely to secure his appearance at the trial; for the same reason bail is taken; but if it could be made judicially certain, that he would voluntarily appear and submit to that trial which the law has decided he must undergo, he would be allowed his liberty without bail.

Now the true question before the court, in the case of McLeod, as we understand it, was, not whether the prisoner, as an acknowledged subject of trial, should be allowed to go at large and await that trial, but, whether he was *liable to be tried at all.* Between the two questions, there is a wide distinction; and the copious learning of the court upon the former question is wasted when applied to the latter.[1]

The court, after considering and applying the English cases in the manner we have stated, and remarking, very justly we have no doubt, that the law of England was the law of New York, until the new *habeas corpus* act of the state took effect, proceed next to inquire, whether that new statute has worked any enlargement of those powers, beyond what they before possessed.

The section of the statute relied upon by the prisoner's counsel, is thus cited by the court: "The party brought before such court or officer, on the return of any writ of *habeas corpus*, may *deny* any of the *material* facts set forth in the return, or *allege any fact* to show, either that his imprisonment or detention is unlawful, or that he is entitled to his discharge, which allegations or denials shall be on oath; and thereupon such court or officer shall proceed, *in a summary way*, to hear such allegations and proofs, as may be produced in support of such imprisonment or detention, or against the same, and *to dispose* of such party as *the justice of the case may require.*"

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[1] If we are right in this view of the two questions, the argument of the court (speaking in scholastic language) is not *ad idem*, but rests upon an *ignoratio elenchi*, which has been ranked in the category of logical fallacies, from the time of Aristotle to Burgersdicius and all his successors. *Aristot. Organ. De Sophisticis Elenchis, cap.* 5.

Under this statute, say the court, "the prisoner's counsel claim the right of going behind the indictment, and proving that he is not guilty, by affidavit, as he may by oral testimony before the jury." But they further say — "We have already shown the absurdity of such a proposition in practice, and its consequent repudiation by the English courts. And we were not disposed to admit its adoption by our legislature without clear words or necessary construction. We think its object entirely plain without a resort to the rules of construction. Its words are satisfied by being limited to the *lawfulness of the authority* under which the prisoner is detained, without being extended to the force of the evidence upon which the authority was exerted, or which it may be in the prisoner's power to adduce at the trial. This, if necessary, is rendered still more plain, by considering the evil which the statute was intended to remedy. At common law it was doubtful, whether the prisoner could question the truth of the return, or overcome it by showing extrinsic matter, upon the point of authority to imprison. The statute was passed to obviate the oppression, which might sometimes arise from the necessity of holding a return to be final and conclusive, which is false in fact, or, if true, depending for its validity on the act of a magistrate or court, which can be shown by proofs *aliunde* to have been destitute of jurisdiction." The court add — "There are various cases in which the enactment allowing proof extrinsic to the return may have effect, without supposing it applicable here. It must, we apprehend, for the most part, apply to the cases where the original commitment was lawful, but, in consequence of the happening of *some subsequent event* the party has become entitled to his discharge; as, if he be committed till he pay a fine, which he has paid accordingly, and the return states the commitment only; so, after conviction he may allege a pardon, or that the judgment under which he was imprisoned has been reversed."

Now, though there are some things here from which we should not dissent, yet we must add, with great submission, that this view of the original objects of the process of *habeas corpus*, and of the New York provisions for carrying into effect this great remedial writ — the citizen's safeguard — strikes us as too narrow and refined to answer the great practical purposes intended in a free country. We cannot bring our minds to the opinion, that this great legal, or, more justly speaking, constitutional provision against oppression under color of law or otherwise, is to be construed and applied with the subtilty and strictness, that a special pleader would use in construing an ordinary statute provision regulating eaves-droppings or pound breach. It is, in our judgment, to be construed as all *constitutional* privileges are; the citizen is to be made *absolutely sure* of protection in his personal liberty. In questions of this magnitude, there is to be no room for the application of those narrow and artificial rules, by which — useful and necessary as they may be, in the ordinary administration of justice between party and party — the astuteness, or the corruption, or the

timidity, of a judge may, under a legal form, deprive a citizen of the substance of his political privileges. We trust it is unnecessary to add, that these remarks are general, and not intended to imply any fears or suspicions of the honorable individuals who now fill the New York bench.

Without, therefore, attempting a minute analysis of the New York statute — which might be presumptuous in those who live in another state — we cannot but direct the attention of the reader to the language of the *substantial* parts of it; which really seems to be as broad and comprehensive as it could be made for the purpose of insuring the great objects in view. The party brought before the court on this process may "deny any of the *material* facts set forth in the return, or allege *any fact* to show, either that his *imprisonment or detention is unlawful*, or *that he is entitled to his discharge.*" What are the "material" facts here spoken of? Does not the statute include facts that go to the *merits*? or are they to be excluded? An issue is made; and that issue is to be tried "in a summary way" by the *court;* who, after hearing the allegations and proofs produced, in support of such imprisonment or against the same, are directed "to *dispose* of such party as *the justice of the case* may require."

Can it be, that the legislature of New York intended, by these particular provisions for hearing the party, that he should only be heard upon "the lawfulness of the authority" under which he was detained? The statute appears to us to provide, in terms, for something more than this; the prisoner may not only deny the material facts in the return, but he may also allege, on his part, *any* fact to show — either that his imprisonment or detention is unlawful, or, that *he is entitled to his discharge;* and these questions are to be determined, not by a jury, but by the court, in "a summary way" — a provision as to the mode of trial, which was probably introduced into the law, to prevent the possibility of an inference, that an issue involving so much matter of fact, as would thus be open to the party, should be sent to a jury.

The restricted view above taken of the statute by the court, had not, if we are rightly informed, been the prevailing opinion of the profession in New York, previously to this decision. One eminent jurist of that state, Chancellor Kent, states briefly the provisions of their *habeas corpus* act, thus:

Persons restrained of their liberty *are not* entitled to the process of *habeas corpus*, if they are detained (1) by process from any court or judge of the United States having exclusive jurisdiction — (2) or by *final* judgment, or decree, or execution thereon, of any competent tribunal of civil or criminal jurisdiction; — or (3) for any contempt specially and plainly charged in the commitment by some court, &c., having authority to commit on such a charge, &c. On the other hand, he says, affirmatively, that all persons restrained of their liberty *are* entitled to this writ, unless detained (1) by process from any court or judge of the United States (as above), and (2) by *final* judgment

or decree, or execution, &c. as before stated. This eminent writer then adds, that no inquiry is to be made into the legality of any process, judgment or decree of the United States courts (as above) nor where a party is detained under *final* process, or for contempt, as before stated. But, he adds, that the court awarding the writ "may in other cases examine into the *merits* of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require." 2 Kent's Com. 29, 30, fourth edition.

On this subordinate part of this great subject we will only add one further remark. Considering the case as it was originally presented to the court, and abstractedly from the political circumstances connected with it, we do not mean to say, the court might not have found sufficient legal grounds for refusing at that time to discharge the prisoner under the process pending before them; unless the provisions of their revised *habeas corpus* act required, in favor of personal liberty, that liberal construction, which upon a general view, this remedial statute would seem to admit of. On this point we have already ventured to remark, as far as would be becoming, and, we hope — for such was our intention — with all that deference, which practisers under a different jurisdiction ought to entertain upon questions of this description.

We forbear any further remarks upon this part of the case; and, passing by the minor question, which is next argued by the court, as to the power of entering a *nolle prosequi* under the laws of New York, we now proceed to a consideration of the remaining, and fundamental question arising in the case; that is, the want of jurisdiction in the courts of the state from the moment it appeared, that the act of McLeod was adopted, or recognized as an act done under the authority of his government; from that time, as we understand the law of nations and the rights of the whole "people of the United States," the American nation, who established their Federal constitution "for the common defence" and "general welfare," from that time, we say, the jurisdiction of the state court ceased, and the United States, the nation, had jurisdiction of the case. We say, emphatically, the rights of the nation; for the nation has rights corresponding to its obligations, as well as the individual states composing the nation. We say this with all tenderness for state pride, and with the most sincere regard for state rights; which we shall be as unwilling to surrender, as we are the rights of the nation.

Regarding this question as fundamental, and considering the vital importance of a right decision of it to the peace and safety of our country, we have deeply regretted, that the court of New York should have been prevented by any other business, however "pressing," from bestowing upon this question the fullest consideration. They remark, that they "have looked into it as far as possible, during a very short vacation, consistently with other pressing judicial avocations." It is

one of the misfortunes of our country, that our judicial officers, in all the states, and in none more than in our own, are so oppressed with the constantly accumulating load of business, that they are not able, even at the sacrifice of health and domestic comforts, to discharge their onerous duties, to their own satisfaction, even in the limited sphere of ordinary municipal law; that they accomplish as much as they do, ought to excite our wonder, instead of the complaints, that we sometimes hear, of the delays and impediments in the proceedings of our courts. This pressure of business must, undoubtedly, be severely felt in the courts of a state, like New York, where, in addition to its own vast concerns, the business of the whole union centres.

Notwithstanding this state of things may, however, in the ordinary current of affairs, be sometimes a sufficient reason for hasty or partial investigation of the cases before them, yet, when a judicial tribunal of a state considers itself called upon to go beyond the ordinary and familiar sphere of its action, and to decide the very highest questions of international law — questions involving the peace and safety of the whole nation — in such cases, we say unhesitatingly, but with all respect, the country has a right to its most deliberate and mature judgment. The local business of the state, urgent as it may be to suitors under the state laws, must give place to what vitally concerns the whole nation; and, however much the court might be entitled to indulgence under such circumstances, yet, if a hasty and unsound judgment should happen to be made in such a case and lead to fatal consequences, the nation would not feel satisfied with the apology, that the court were too much pressed for time and by the ordinary current of business, to allow them to mature their opinion. But we proceed to the question.

The court, in entering upon this branch of the case, observe, that "the want of jurisdiction has not been put (by the counsel) upon the ground that McLeod was a foreigner." They, however, lay down the general position, that "an alien, in whatever manner he may have entered our territory, is, if he commit a crime, while here, amenable to our law." And several authorities are cited by the court in support of the rule.

Such general positions, without stating the various qualifications with which they are to be understood, are comparatively of little importance in deciding grave practical cases. In the present instance, the authorities cited, advance us but little towards a resolution of the main question. In the first, (Cowp. 208,) one Campbell, a natural born subject of Great Britain, purchased a plantation in the island of Grenada (then recently conquered by that power), and brought an action against the collector to recover back a sum of money paid by him as duties on sugars exported on his account — on the ground, that the duty had not been imposed by lawful authority; that is, the authority of the nation that made the conquest. But the question raised was, whether the king, of himself, had the power to change the

existing laws of this land; and the court decided, that the king, by a proclamation, had precluded himself from the exercise of a legislative authority over the island. Surely, authorities like this, afford little aid in the case. The other authorities cited under this head, do undoubtedly sustain (Vattel, book ii., chap. 8, § 101, 102, and Story's Conflict of Laws, p. 518, and Locke on Civ. Gov. book, ii., ch. 2, § 9,) a general principle, which few persons would question — that foreigners are subject to the laws of the country in which they are. To this general principle, however, there are numerous qualifications; and when the court say, that an alien is amenable to our laws, in whatever manner he may have entered our territory, if he commit a crime here, and when they apply this rule to the present case, they assume, that a crime simply against the municipal laws of the state has been committed. But the very question here is, whether such a crime has been committed. That a homicide has been committed, is not disputed; and so it would have been, if a whole regiment of Queen Victoria's army, under the express orders of her majesty, had entered our territory, whether to destroy a steamboat, that was annoying them, in violation of our neutrality, or to surprise one of our forts, and had in the attempt killed an American citizen; but would such an act of hostility be a "crime" cognizable under the state laws of New York? That it would be a hostile violation of the national territory, we have no doubt; and one which the United States would have a right to consider as an act of war, or not, as they might think proper, and to demand, or waive satisfaction accordingly. But, that the state of New York would have a right to treat it as a mere violation of the state laws, without regard to the rights of the nation, we cannot believe to be the intent of the Federal constitution, which is the supreme law of the land for the great and powerful state of New York as well as for its little neighbors Rhode Island or Delaware.

Abstractedly speaking, the act of McLeod might be considered as an act (in technical language), against the peace and dignity of the state of New York; but by the circumstances of the case, the offence against the state was merged in that against the union. It was a case arising out of war, (as will presently be considered), and involving the principles of neutrality, which belong exclusively to the authorities of the nation. When the Caroline was burned, England was at war with a part of her Canadian subjects; the parties were actually in arms against each other, and the insurgents had taken possession of a British island. England, of course, would not call it war; her natural pride would not permit her to acknowledge this; she would call it rebellion, insurrection, riot, or any other crime, rather than war. But neutral nations are not to participate in that national pride; whenever they see one part of a nation in arms against the other, they must call it war, and observe with respect to them the laws of neutrality; they are not to consider whether it is a civil, a servile, or any other kind of war; they can only judge of the fact before their eyes, and,

as the great publicist, Bynkershoek, justly says, "a neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as a judge between his friends who are at war with each other." [1]

It will be recollected by all who are acquainted with our own history, that during the American revolution, the nations of Europe considered the colonies as being at war with Great Britain, though she treated us as rebels. Denmark, alone, undertook to judge of the nature of the contest, and restored to Great Britain prizes which Commodore Paul Jones had sent into Danish ports; but the United States considered the conduct of Denmark as a departure from the law of nations, and made claim upon the Danish government, who at last made reparation in damages for this violation of our belligerent rights. Other cases and authorities might be cited; we only wish, however, to call the attention of reflecting men to the true character of the present case, which, though sufficiently clear in itself under the law of nations, has been somewhat obscured by the excitement of the moment, and by a warm, and natural sensibility to the national honor.

But whether we consider the Canadian insurrection as a civil war, or as a rebellion, it was a contest in arms, in which we were *neutral.* The burning of the Caroline, effected under the authority of the local government of Canada, was an act of retaliation for an alleged previous violation, by our citizens, of our neutrality. The act, now assumed by the British government, was an act of hostility. It need not be argued, that it placed us absolutely in a state of war with Great Britain, as it was not followed by any act of a similar character, either on her part, or on ours; both nations were, and are, willing not to consider it as an interruption of the state of amity which, at least professedly, existed between us. But, that it was an act of hostility which we might have considered as war, if we had thought proper to do so, cannot be denied.

The court of New York, however, have taken a different view of this part of the case, and have expended a vast amount of learned research, to show what constitutes war. The thesis maintained by the court is — that "to warrant the destruction of property, or the taking of life, on the ground of public war, it must be what is called lawful war, by the law of nations; a thing which can never exist without the actual concurrence of the war making power. This, on the part of the United States, is congress, on the part of England, the queen."

Does this learned tribunal mean to be understood as affirming, that lawful hostilities cannot exist, until both parties commit some act of force upon each other, and thus stand (if we may so speak) before the common forum of civilized Europe, each one *rectus in curia*, as parties plaintiff and defendant would appear before the court of New York, in an action at common law for an assault and battery? If that is the doctrine intended to be laid down as the public law of Europe,

[1] Bynkersh. Quæst. Jur. Publ. Book i, ch. 9.

we must beg leave, with much submission, to dissent from it. But if the court mean to admit, that one "war making power" may make a lawful war, then the proposition amounts to nothing more than we maintain; for one power, the queen of Great Britain, has made lawful war by recognizing the hostile act (which we have above briefly considered) as having been committed by McLeod and his party, under her authority. On this point, we may add a remark of Lord Stowell, in the case of the Nayade, a Portuguese vessel. That great judge says — "It was argued, that there was nothing to show, that Portugal was at war with France, &c. In cases of this kind it is by no means necessary, that both countries should declare war. Whatever might be the prostration and submissive demeanor on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it is sufficient."[1]

Will it be said, that this recognition or adoption of the hostile act of McLeod cannot relate back to the time when it was committed, and thus sanction it, as if committed originally under an express order of the British sovereign? There is a sufficient answer to this objection in the general principle of law, that a subsequent ratification is equivalent to an original authority. But we have a more precise answer, in the distinct opinions expressed upon this specific question by our own and British judges. That great jurist, who has done such lasting honor to his country, Mr. Justice Story, in the case of the *Emulous*, states the very case of a subject's committing hostilities without being originally authorized, and then uses this strong language in respect to a subsequent ratification: "Suppose he does [so commit hostilities]; I would ask, if the sovereign may not ratify his proceedings, and thus, by a retro-active operation, give validity to them? Of this there seems to me no legal doubt." The learned judge then commenting on one of the authorities cited, asks: "Is there any thing in Puffendorf [Book viii, ch. 6, § 21] to authorize the doctrine, that the subject so seizing property of the enemy, is guilty of a very enormous crime, of the odious crime of piracy? Or is there in this language any thing to show, that the sovereign may not adopt the acts of his subjects in such a case, and give them the effect of a full and perfect ratification?"[2]

In support of his own opinion, he refers to the well known case of *Thorshaven*, decided by Sir William Scott, who says, most emphatically — "Now there are instances innumerable, in which it has been held by this court, that an officer not immediately under the eye of government, may originate such expeditions, [hostile ones], subject to a responsibility; and, that the government, in the present instance, has approved of what was done, is demonstrated, &c. It is, therefore, as much an authorized capitulation, as if captain Baugh had gone out under special directions, to make the capture."[3]

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[1] 4 Rob. Adm. Rep. 251. [2] 1 Gallis. Rep. 568. [3] 1 Edw. Adm. Rep. 102.

But we return to the question raised by the court, as to the constituent elements of lawful war.

The learned judge, who delivered the opinion of the court, says — that "so far were the two governments of England and the United States from being in a state of war when the Caroline was destroyed, that both were struggling to avoid such a turn of the excitement on the frontier, as might furnish the least occasion for war. So far from England fitting out a warlike expedition against the United States, or any public body, she utterly disavows any such object; while, on our side, we have inflicted legal punishment on the leaders of the expedition, of which Durfee made a part, on the ground, that England was then at peace. Whatever hostile acts she did, were aimed exclusively at private offenders; and, if there was a war in any sense, the parties were, England on one side, and her rebel subjects aided by citizens of our own, acting in their private capacities and contrary to the wishes of this government, on the other."

All this may be very true, as respects the declarations and conduct referred to; and it proves — what? That both parties did not choose to be considered in the posture which the learned judge defines as public war. But does it prove that England had not committed any hostile act, which might be a justifiable cause of war, if the United States had thought proper to do so? Taking the statement here made, she declared that she did not intend to make war or commit a warlike act; but, in point of fact, she did commit such an act; and that is sufficient for the argument.

The learned judge then defines, or describes particularly what he considers to be public war. He says — "I mean to include all national wars, whether general or partial, whether publicly declared or carried on by commissions, such as letters of marque, military orders, or any other authority emanating from the executive power of one country and directed against the power of another; whether the directions relate to reprisals, the seizure of towns, the capture or destruction of private or public ships, or the property of private men belonging to the adverse nation. I mean to exclude all hostility of any kind, not having for its avowed object, the exercise of some influence or control over the adverse nation as such."

The whole of this definition, or description of war, rests upon the supposition, that there are but two parties, by or upon whom hostile acts can be committed. The learned judge speaks of the "adverse nation," as in a petty trial at common law we should speak of an "adverse" party in a civil suit. But here, as in other parts of this case, we must apply the rule of logic — *distinguendum est*, a distinction must be made. It is not merely the directly belligerent parties who are affected by each other's hostile acts, but the neutral nations also, who happen to be their neighbors. Innumerable acts of hostility, ordinarily of a partial, limited and local character, may be committed, by each belligerent, upon its neutral neighbor, without being intended

"to control the adverse nation," that is the neutral, which would be good cause of war, if the neutral should choose so to consider it; and of these acts, one of the most common is that which actually happened in the present case — a violation of the neutral territory. Now, if we understand the very narrow and limited definition of war, which is adopted by the court, that is, that we must exclude from it "all hostility of any kind, not having for its avowed object the exercise of some influence or control over the "adverse nation, as such" — that whole class of hostile acts, of a local or partial character, which are so constantly occurring, must be struck from the catalogue of acts of war, because they fall short of a general influence or control over the whole neutral nation, as such. But the neutral, in the cases supposed, is not an "adverse nation;" it commits no hostile act at all, but happens to be in the position of an innocent bystander in a private quarrel, who receives a blow without cause from one of two contending parties. And can it be said, in that case, that the party who inflicts the blow upon the unoffending bystander, does not commit an act of hostility, (if we may so term it,) which may be resented or not, as he thinks proper, by retaliatory measures on his part? Now a neutral nation is in a similar position in respect to belligerents; and it may patiently bear, or may boldly resent any hostile act, great or small, partial or general, as it thinks expedient. But the actual state of things between the two is, to all intents, a state of war. Every act of force by a government upon the territory of a foreign nation (unless fresh pursuit should be an exception), is war.

Nor is it merely as between belligerents and neutrals, that such acts of hostility, or violence, may be committed. In time of profound peace, outrages on nations and individuals of nations, are frequently occurring, which would not be war within the definition adopted by the court of New York, but which, in the common understanding of nations, and, according to the principles laid down by publicists and statesmen, would be war. A few well known cases, we think, will set this matter in its proper light, both as respects neutrals and others.

And we take the first case that occurs to us, as it is within our own time, and in the recollection of many persons now living. In the year 1798, when the French government fitted out their well known expedition to Egypt, being in want of transport ships, they seized upon more than an hundred neutral vessels, which happened to be then in French ports, and sent them off to Egypt with the French troops on board. Can there be a shadow of doubt, that this was a direct act of hostility, that it was a "warlike" act, that it was war, in short, upon the various neutral nations to which those vessels belonged, and that this forcible seizure was a good cause of war on the part of those neutrals? It is true, that those nations did not elect to make war; whether from not having strength to cope with France, or from pusillanimity, or any other motive, is immaterial; it does not alter the character of the act committed against them. Yet this hostile act

was not committed for the purpose (in the language of the court) of exercising any "influence or control over the adverse nation as such;" the government of France were so far from intending to commit the act as against an "adverse nation," that they did not trouble themselves to consider to what nations the vessels belonged, whether friends or foes; and, therefore, according to the definition of war, as given by the court, here were no hostilities, no war.

In an earlier period of history, Oliver Cromwell, in the plenitude of his power, was told by one of his fanatical flatterers, that he was "a stone cut out of the mountains without hands, that would break the pride of the Spaniard;" and, accordingly, in a time of profound peace, and without any declaration or notice whatever to other nations, he equipped a squadron for the West Indies, which made an unprovoked and unsuccessful attack on Hispaniola; when, in order to atone as far as possible for this failure, his commanders in the squadron, dreading his displeasure, projected on the spot an attack upon the island of Jamaica, which, as it happened, surrendered to them without a blow — yet this could not be "war" within the definition of the court? The Spaniards, however, very justly considered it as such, and, in return, declared war against England, and made a general seizure of all English ships and goods within their reach. But, if they had been pusillanimous enough to submit to the outrage instead of declaring war, would the act committed by the English commanders have been any the less an act of war?

The case of the Spanish ships, captured by the English, in modern times, (1804,) was a similar act of war against Spain. Their attack on Copenhagen, in 1808, was of the same description.

In our own history, again, Spain, after shutting the port of New Orleans, contrary to treaty, subsequently marched armed men into our territory and seized our citizens; not for the purpose of acting upon the United States as an "adverse nation," but for local and partial objects. Yet there can be no doubt it was an act of war on her part, though we did not think fit to meet it with a declaration of war on ours.

Another class of cases, distinctly marked, is that of injuries committed by a nation upon an individual subject of another government. Need we cite an authority for this? we have a very high one from the state of New York itself. Mr. Chancellor Kent says — "An injury to an individual member of a state is a just cause of war, if redress be refused;" but, he adds, in the humane spirit of the public law of Europe, "a nation is not bound to go to war upon so slight a foundation; for it may of itself grant indemnity to the injured party."[1] Numerous cases of this description are to be found in the history of nations; and we do not now recollect one (doubtless there may be some) in

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[1] 1 Kent's Commentaries, 48, 4th edit.; where he cites Grotius and other authorities.

which the violence upon the individual was committed by the subjects of the offending state, with the view (as the court expresses it) to exercise "influence or control over the adverse nation, as such," whose subject was thus outraged. But we need not multiply cases.

Can it be then, that under the well established usages of nations, the several classes of hostile acts we have mentioned (to say nothing of various others) are to be "excluded" from the idea of "war," as practically understood by all statesmen and publicists, and that we must narrow it down to the conceptions of a subtle special pleader, in an action of assault and battery at *nisi prius?* We cannot bring our minds to this view of the subject, after reviewing it deliberately and sincerely; but, after all our care, and with all possible deference for the official opinion, and all personal respect for the learned judge who delivered it, we feel ourselves compelled, in the brief but expressive formula of the great Ottoman law officer, to say to Mr. Justice Cowen, "Olmaz, it cannot be!" [1]

After the consideration we have given to this portion of the subject, it is needless to follow the court through their minute and somewhat prolix discussion of the various kinds of war — solemn, unsolemn, and mixed — distinctions to be found in all the earlier text writers, but which have long been of little utility in the resolution of practical questions. When, therefore, the court intimate that the hostile violation of the American territory, in the case of the Caroline, cannot be "tortured into a *war*," it is evidently a dispute about words. Whatever England may now choose to assert, after having adopted the act of McLeod as a national act, and however pacific the United States may choose to be in return, the original character of the hostile act, so far as relates to the liability of McLeod, is not changed. The learned judge proceeds to illustrate the case, by likening it (among others) to the acts of force committed by individuals upon their fellow subjects in violation of the municipal laws under which both parties live, and under which the military power is sometimes called out as a *posse comitatus* to aid the civil authorities; but the cases are not parallel. Here was an invasion, by one party, of the jurisdiction of the other — a neutral jurisdiction; and we have no disposition to dissent from the authorities cited by the court on the inviolability of a neutral territory; it lies, in fact, at the foundation of this case.

We acknowledge, however, that we were surprised at the remark of the learned judge, when he says, "there is nothing in this case, except a body of men, without color of authority, bearing muskets and doing the deed of arson and death; and that it is impossible even for diplomatic ingenuity to make it a case of legitimate war, or that it can plausibly claim to come within any law of war, public,

[1] Jones on Bailments.

private, or mixed." But we have already stated our views on this point, and forbear repeating them.

Nor are we less surprised at the strong statement of the "result" at which the court next arrive; that the provincial government of Canada attempted to exercise jurisdiction over our citizens; that, being convinced of the "delinquency" of the Caroline, they "sentenced her to be burned; an act, which all concerned knew would seriously endanger the lives of our citizens. The sentence was therefore equivalent to a judgment of death, and a body of soldiers were sent to do the office of executioners;" and again — that "the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. If they have burned, it is arson; if a man should be killed, it would be murder."

Dismissing the rhetorical warmth of this statement, as lying beyond the hallowed precincts of the seat of justice (though too often admitted there), let us look merely at its legal and logical soundness.

It is asserted, that the Canadian authorities *knew* that the burning of the steamer Caroline would seriously endanger the lives of our citizens. On the contrary, we would respectfully ask, whether, legally speaking, the Canadian authorities were not bound to presume that no American citizen would, in violation of the neutrality of his country, be found on board of a vessel that was employed in thus annoying the neighboring possessions of a friendly nation; and, consequently, might they not reasonably, in law, presume that they would not endanger any American lives, by attempting to destroy a vessel thus employed, and which was the sole object of their expedition? But we repeat once more — they did commit an offence, and a very high one: the violation of our territory in a time of peace, by entering upon it without our consent, and there adding the further aggravation of committing the violence and homicide in question. This, however, having been done under the authority of their government, the individuals thus acting under a commission of their nation, cannot be condemned under the municipal laws as private offenders guilty of "arson" and "murder" on the land, any more than the subjects of a foreign nation, acting under a national commission at sea, can be held guilty of piracy. The rule of international law on this point is well laid down by that able and enlightened jurist, a New York jurist too, whom we have before cited: "An alien," says Mr. Chancellor Kent, "under the sanction of a national commission, cannot commit *piracy* while he pursues his authority. His acts may be hostile, and his nation responsible for them. They may amount to a lawful cause of war, but they are never to be regarded as piracy."[1]

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[1] 1 Kent's Comm. 188, 4th edit.

Again; it is said that the parties concerned, having acted entirely beyond their territorial or magisterial power, are treated by the law as individuals proceeding on their own responsibility. We must here once more remark, that, on logical principles, this argument is vicious, because, in the terms stated, it proves too much; if well-founded, then a foreign army entering a neutral territory under a commission from their sovereign, would be liable as private robbers and murderers. But the law of nations places such violations of right upon the ground of hostile acts — acts of war.

We are now brought to a consideration of the fact, that the British government have ratified the act, committed by McLeod, as a national act; or, as stated in the very marked language of the opinion, we are to inquire "whether England has placed the offenders above the law and beyond our jurisdiction, by ratifying and approving such a crime."

The court remark, that it is due to England, in the first place, to deny that it has been so ratified and approved; she has approved a public act of legitimate defence only.

Now it seems to us, that however necessary it might be for McLeod, if on a trial in the courts of his own government, to prove that he had not exceeded his authority, in order to justify himself to his employers, yet, in respect to ourselves, it is not necessary for us to inquire, whether it was an act of legitimate defence or not; what have we to do, as neutrals, with the character of the controversy between the government of England and her Canadian subjects? England has now ratified the act, whatever it was, and the government of the United States (not of the individual state of New York,) must judge of its character. Besides, the Secretary of State, in his able letter to Mr. Fox, takes no such distinction as his ground of argument; but explicitly says: "The government of the United States entertains no doubt, that after this avowal of the transaction as a public transaction, authorized and undertaken by the British authorities, individuals concerned in it ought not by the *principles of public law* and the *general usage* of civilized states, to be holden personally responsible in the ordinary tribunals of law for their participation in it." Whatever, therefore, might have been the true character of the act in question, the American government, without any refined distinctions on that point, has received the British statement of the transaction as given by the minister, and has acknowledged that the individuals concerned in that same transaction ought not to be held personally responsible.

We have not room to follow the court through the great mass of historical and other learning which is brought into this case from all parts of history, ancient and modern, as well as from law books, to establish various well-known principles; as, the inoperative character of laws beyond the territory of the nation making them; the general rule, that soldiers are not to be treated as criminals, when only obey-

ing the lawful commands of their superiors; the limits of political and civil power; the law relating to spies, (which, by the way, is by common consent an excepted case); the relation of principal and agents, or accessories in acts of force, &c. All this, in our view, is unnecessary, as we think the case rests upon principles of public law, that are well settled, and need not be fortified by authorities like those which are arrayed in support of this part of the opinion.

The court ask, with much emphasis, and in a marked tone and phraseology, "Was it ever suggested by any one, before the case of McLeod arose, that the approval by a monarch should oust civil jurisdiction, or even so much as mitigate the criminal offence; nay, that the coalition of great power with great crime does not render it more dangerous, and therefore more worthy of punishment under every law by which the perpetrators can be reached?"

The whole effect of this broad and indefinite question, and the answer to it, will depend upon the sense in which certain terms are to be taken; the criminal offence is not defined — nor the jurisdiction — nor the character and powers of the tribunal whose jurisdiction is to be ousted — nor whether the approval is to be that of a "monarch" whose own laws are violated by his own subjects, or that of one, who authorizes his subjects to violate the laws of another nation by committing hostile acts, or making war upon it. It is obvious, therefore, that this question is not stated in a form susceptible of a definite answer, that would be of any utility in solving the main question before us. And when a question of this indefinite character is attempted to be illustrated by equivocal cases from general history — as that much vexed one of Mary, queen of Scots; and an intimation is made, (in guarded terms however,) that the pope had, over Mary, as his civil subject, that species of jurisdiction which would have authorized him to exonerate her by his formal approval of her alleged criminal act — we are unwilling to attempt to dispose of the question and its illustrations in a plain argument upon a question of law, lest we should not do it in such a mode, as would be deemed suitable to the occasion and the high tribunal whose decision we are considering.

The case of our border difficulties on the frontier of Maine, to which the court refer in a tone of animation somewhat beyond the usual even tenor of the judicial tribunals in our own quarter, is one of a more tangible character than some others cited; and the conduct of Great Britain in that quarter might, in a diplomatic negotiation, be very properly urged as an *argumentum ad hominem* to obtain our just rights. But if (as we assume) Great Britain was there in the wrong in point of law, and unjustly punished our citizens for exercising acts of civil authority in what the court consider as a "disputed" territory, still, in an American court of law, this injustice on her part would be no reason for our doing injustice to one of her subjects in another case. The fact of the territory being a "disputed" one, as stated by the court, would be a justification for many things on that frontier, for

which Great Britain would have no apology on the well-defined and undisputed territory where the Caroline was destroyed; and, so far, even this practical case will not give us any essential aid in the present inquiry.

On the point of the recognition of the act of McLeod by his government, we apprehend there can be no room for a question under the law of nations, and as far as it is a matter for judicial consideration. We may, out of court, or in a diplomatic negotiation, suspect that this recognition on the part of the British government is an afterthought, and treat it accordingly; but not so in the actual posture of the case before the court.

The general principle applicable to such cases is perfectly well settled, and is laid down by Vattel in these terms, — after stating that individual citizens shall not be allowed to commit offences against other nations with impunity, — "But, if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern, and the injured party is to consider the *nation* as the real author of the injury, of which the citizen was perhaps only the instrument."[1]

Such is the general principle of public law; and when the author speaks of the right of the injured nation to hang spies and emissaries and kidnappers or man-stealers, if caught within its jurisdiction, he speaks of classes of offences, which are by common consent treated either as exceptions or qualified cases under the general rule, or as not having the character of *national* offences or injuries.

If we are right in the views we have thus far taken of this case, the remaining question will be, what effect the existing state of facts should have had upon the proceedings in the New York court. We have already said, that the moment the government of Great Britain adopted the hostile act as a national act, the jurisdiction of the *state* court ceased, and the case belonged to the courts of the United States, which have the jurisdiction of all cases arising under the constitution, the laws of the United States, treaties, &c. The present case is one of peace and war, subjects exclusively belonging to the general government. Unless questions of this nature are to be settled by the authority of the United States exclusively, it is manifest, that a single state may involve the nation in a war directly in contravention of the rights and interests of the other five-and-twenty states; if this should be conceded to each state, then we must also, on the other hand, concede the like power to make peace, which would lead to inextricable confusion. The *state* courts, manifestly, cannot take notice of, or act upon, the complaints of foreign governments. If the territory of a state has been invaded, or their rights violated by persons acting under a foreign authority, they cannot (except in the specific cases provided for in the constitution)

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[1] Vattel, book ii. ch. 6, sect. 74.

undertake to do justice to themselves; but they must apply to their natural protector, the government of the United States. It would not be just to the individual states, to throw upon their judicial, legislative, or executive departments, the responsibility of cases that threaten to involve the nation in war; this responsibility should be entirely borne, and with firmness, by the power to which it belongs, — the general government.

If, then, the state court has not jurisdiction, a question arises, whether that fact should not have been shown, by a plea or suggestion, at an earlier stage of the cause. By no means; it may be shown at any time in cases of this description. In Pennsylvania, in the case of a foreign consul (*Manhart* v. *Soderstrom*), the point was expressly decided, that whenever the defect of jurisdiction is suggested, the court will quash the proceedings; it is not necessary that it should be by plea before general imparlance.[1]

Following out the mere matter of legal procedure, we should say, the supreme court of New York ought, according to their own practice, to have turned over the prisoner to the officers of the United States. In that court, the practice is thus stated by Woodworth J., in the case of *Exparte Smith* — "Detaining a prisoner by state authority, in order that he may be delivered over for prosecution to the United States, is by no means an unusual exercise of power. This court has repeatedly sanctioned such a proceeding, and, in one case, very lately."[2] This was also a proceeding on *habeas corpus*.

In reviewing our remarks upon this case, so vital to the safety of our country and to its reputation for justice with other nations, we perceive that we have unintentionally omitted some views which ought not to be wholly overlooked.

On the last point which we have considered, the point of jurisdiction, the learned judge observes, "In no view can the evidence for the prosecution or the defence be here examined independently of the question of the jurisdiction; and I entertain no doubt, that whenever an indictment for a murder committed within our territory is found, and the accused is arrested, these circumstances give complete jurisdiction."

Do the court mean to say, that if a foreign ambassador, or a foreign consul, should be indicted for murder in the state of New York, that the courts of that state would have "complete jurisdiction" of the case, notwithstanding the constitution of the United States expressly gives jurisdiction to the federal courts in all cases affecting those public functionaries? We put one other case, which in principle would stand before the court precisely as that of McLeod does. Suppose a foreigner was indicted for any offence under the state laws, and while the indictment was pending he should be appointed ambassador from his government to the United States; can there be

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[1] 1 Binney's Reports, 138.

[2] 5 Cow. Rep. 273.

any doubt, that this new state of the facts would forthwith take the case from the jurisdiction of the state court, and make it a matter exclusively for the national government? Can there be any doubt, too, that evidence of this new state of facts might be heard by the court "in a summary manner," instead of sending the ambassador to be tried by a state jury? The new state of facts in McLeod's case would, we apprehend, have the same effect.

In this connection we may add a remark upon the subject of submitting the evidence in the present case to a jury, as the court seem to consider the proper mode of procedure. What is the great fact in controversy, and by which the question of jurisdiction would be determined? It is, whether the act for which the prisoner stands indicted, was a private act committed by him without or beyond his authority, or was a public act of hostility — an act of war — done under the orders of his own government. Now, in what mode is this to be proved? Is it a common matter *in pais*, to be proved by witnesses, or an act of the government, to be proved by official evidence, of which the court would feel bound to take notice? Must the fact of the existence of war or peace, be proved before a jury by witnesses, or by the acts of the government? An astute special pleader, before a petty court of sessions, in such a case, would perhaps say, the existence of *war* is indeed provable by the act of congress declaring it, of which, as a public law, the court would be bound to take notice. If this technical notion should suffice, then, on the other hand, we would ask, how is the termination of a war and the existence of *peace*, to be proved? Here the President of the United States (with the senate) is authorized to make peace, by treaty, which he announces by proclamation. But, says the pleader, how do you prove the treaty and proclamation of the President? We answer, just as we should prove that a foreign ambassador was accredited to our government, or a foreign consul acknowledged, and a thousand other official acts; that is, by official certificates from the proper departments of government, with or without the great seal of state, as the particular case may require. The court, in our judgment, would feel as much bound to take notice of these public acts of the government, and receive this evidence of them, as they would of public statutes, in a summary hearing.

Now, in the present case, what is the evidence that would have been produced to the court, to prove the existence of a state of hostilities, or "a transaction of a public character," planned and executed under the authority of McLeod's own government, and which, on principles of international law, would exempt him from personal liability as a criminal? That evidence would be, the declaration of our own government, attested by the proper certifying officer to a fact of that kind; in this case, we presume, it would be the secretary of state, Mr. Webster; who, in his official instructions to Mr. Crittenden, the attorney-general of the United States, informs that law offi-

cer, that he will be furnished with "authentic evidence of the recognition, by the British government, of the destruction of the Caroline as an act of public force done by national authority."

Of such evidence as this, we apprehend, the court would feel bound to take notice. Indeed, some of the authorities cited by the learned judge indicate this to be the proper and conclusive species of evidence in such cases. In the case of *The Pelican*, before the court of Appeals, Sir William Grant lays down the rule, that "it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide."[1]

The same doctrine was held by Lord Ellenborough in the case of *Blackburn et al.* v. *Thompson*; where he says: "If the state recognises any place as not being in the relation of hostility to this country, *that is obligatory* on courts of justice."[2] He also cites a previous case from 1 Campb. 429, decided on the same principle. The same learned judge, on a hearing of *Blackstone et al.* v. *Thompson*, before the whole court of king's bench, expressly agreed with Sir William Grant in the case of *The Pelican*, and added in emphatic language — "when the crown has decided upon the relation of peace or war, in which another country stands to this, *there is an end of the question.*" He observes further, very justly, that "it would be unsafe for courts of justice to take upon them, without that authority, to decide upon those relations."[3]

Now we would respectfully ask, what fact in the case of McLeod required the intervention of a jury before the state court? His defence, in truth, was more matter of law than of fact; that is, whether he had lawful authority. Suppose the case had been submitted to a jury before a court of competent jurisdiction, and the fact made to appear, that the act complained of on the part of the prisoner was, as our own government acknowledge, a hostile act performed under the authority of the British government. The court would, as we understand the public law of all christendom, be obliged to instruct the jury, that the crime charged had not been committed, and that they must acquit the prisoner. And if bound so to instruct a jury on the trial, why should they not discharge upon the like evidence, in a summary hearing, under their *habeas corpus* act?

Now, as to the mere technical mode of discharge, whether on habeas corpus, or otherwise, even in *England*, we may here cite the language of the secretary of state, Mr. Webster, (in his masterly letter to the British minister,) which we had intended to notice in another part of our remarks: "If," says that great lawyer and statesman, "an indictment, like that which has been found against Alexander

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[1] 1 Edw. Adm. Rep, Appendix D, p. 4.

[2] 3 Campb. Rep. 61.

[3] 15 East's Rep. 81.

McLeod, and under circumstances like those which belong to his case, were pending against an individual in one of the courts of England, there is no doubt that the law officer of the crown might enter a *nolle prosequi* — *or*, that the prisoner might cause himself to be brought up on habeas corpus, and discharged, if his ground of discharge should be adjudged sufficient — *or*, that he might prove the same facts and insist on the same defence or exemption on his trial." [1] Of these three modes of discharging the prisoner, the first would be at the election of the government, and the two last at the election of the prisoner; and Mr. Webster suggests no difficulty in the way of discharging him on habeas corpus even before an English court.

In respect to the question of jurisdiction, we ought not to omit remarking, that the government of the United States, through their secretary of state, have — doubtless from motives of delicacy towards an important member of the Union, or for other reasons of weight — avoided denying that the state court had jurisdiction of the case, and have been equally reserved as to claiming jurisdiction of it for the federal courts. The secretary merely observes, in his letter to Mr. Fox, that the rights of McLeod, "whatever they may be, are no less safe, it is to be presumed, than if he were holden to answer in one of the courts of this government;" and he assures Mr. Fox, that the New York court "may be safely relied upon for the just and impartial administration of the law in this as well as in other cases." Notwithstanding this cautious language in his letter to a foreign minister, however, the secretary in his instructions to Mr. Crittenden, attorney-general of the United States, has, with some emphasis, positively directed that, in case the prisoner's defence should be overruled by the state court, "the proper steps be taken, immediately, for removing the cause by writ of error to the supreme court of the United States."

Now, however expedient it might be, under the existing circumstances, and in a case involving "state rights" (which has too often been but another name for state pride), that the officers of the general government should exercise the greatest delicacy towards a powerful and influential state, commanding forty or more votes in the political questions of the country, yet we — as private citizens, unfettered by the responsibilities of public offices, and not so circumstanced as to feel the influence of the "*civium ardor prava jubentium*," or the "*vultus instantis tyranni*" — may be allowed to treat this subject as disconnected from all those political or other considerations, which might affect the decision of great public questions at certain junctures; we may treat it, on strict principle, as a pure question of *right*, between an individual state, on the one side, and the whole nation on the other.

Considering it, then, in this point of view, we do not see that the

[1] Mr. Webster's Letter to Mr. Fox, of April 24, 1841.

public officers, who administer the government, could lawfully relinquish to any individual state, which should be unreasonable enough to require it, the exercise of those rights which belong to the states jointly, in their collective capacity — in other words, to the *nation*. And it seems to be as much the duty of the Executive of the Union, to assure the nation, that he will neither make nor permit any arrangement or proceedings, "the effect of which might be to compromit, in the least degree, the rights, dignity or honor" of the *United States*, as it was of the governor of New York, to give the like assurances to his constituents in respect to the rights, dignity and honor of his state.[1] The six-and-twenty states, as a nation, have their *rights*, as well as each particular state of the confederacy.

The eminent men, who are called to fill the high offices of the nation, are placed there in order to guard our national rights, as well as to discharge national duties; and the deliberate abandonment of the one would be no less a violation of their trust, than the culpable neglect of the other. If the nation, by its general government, cannot be permitted to exercise its legitimate rights in all cases, but especially in respect to its foreign relations, we shall be once more enveloped in the mists of "nullification," which, we had hoped, were long ago dispelled by the light of that giant intellect of the north, whose beaming rays shot through that Egyptian darkness to the utmost verge of our horizon. The more powerful the state, too, the greater should be its forbearance and magnanimity; as, in proportion to its power, is the danger of its causing a dissolution of the Union.

Notwithstanding, therefore, the acquiescence of the general government, that the trial of McLeod should go on in a state court, we feel constrained to adhere to our original opinion, (expressed long before the government had intimated its own views to the public,) that the New York court had no longer jurisdiction of the case, after the hostile act of the prisoner was adopted by his government. Upon strict technical grounds, then, it might have been argued, that they ought to dismiss the cause for defect of jurisdiction. If, however, they felt any reluctance at assuming that responsibility, then, we think, they ought to have acted no farther than (as we have seen has been practised) to turn it over to the competent United States' court, where the whole matter would be under the control of the general government, on whom the responsibility ought to rest, and who, we doubt not, would firmly have discharged the high duty thus incumbent on them.

But our limits admonish us to bring these remarks to a close. The incalculable importance of this great case, as it regards the vital question of peace or war (to say nothing of our juridical reputation abroad), has drawn us into a longer discussion than we had anticipated.

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[1] Message of Governor Seward to the New York Assembly.

But the subject swells under our contemplation, the more time we have to mark its bearings upon the present prosperity and the future fate of our beloved country. In truth, no single question has arisen since the establishment of the federal government, which has appeared to us to be fraught with more dangers, if it should, in the final resort, be erroneously decided upon a misapplication of the principles of international law, and in a forum, which, in our opinion, is not recognized by that law, nor by our own constitution, as competent.

In discussing this subject, we have endeavored to divest the case of all considerations purely political or temporary, and to treat it, rigorously, as a judicial question, to be settled by a judicial tribunal — not upon flexible principles of time-serving expediency, nor the fleeting emotions of a fervid and high-toned patriotism, whose very ardor and purity expose it only the more to be misdirected by the arts of designing men — but as a question to be settled by those eternal principles of *justice*, by which alone our happy republic can hope to sustain itself; that rigorous justice, of which one of the wisest men and purest patriots of another great republic (long since extinguished from among the free nations of the earth) says with equal truth and force — "*non modo falsum illud esse, sine injuria non posse, sed hoc verissimum esse, sine* SUMMA JUSTITIA *rempublicam geri nullo modo posse.*" [1]

District Court of the United States, Massachusetts, August 6, 1841, *at Boston.*

UNITED STATES *v.* OLIVER.

Under the circumstances of this case, it was held, that the defendant in breaking open a letter, deposited in the post office, had not violated the act of congress of 1825, chapter 275, § 21.

Whether anonymous letters were intended to be protected by that act, — *quære.*

THIS was a complaint against the defendant, as postmaster of Lynn, for opening a letter, which contained only scrawls and incoherent nonsense, without signature, and was addressed to one Barker, of Lynn, who, it appeared, lived in that place. The letter was dropped into the Lynn post office. It appeared, that the prisoner had been informed that many letters of this description had been in the post office, and that this bore the same appearance and hand-writing; that he thereupon opened it, and when Barker called at the office, he de-

[1] Cic. de Republica, lib. ii. 44. Edit. Maii.

livered it to him, saying that he had taken the responsibility of opening it.

Dexter, district attorney, stated that the complaint was founded upon the 21st section of the post office act of 1825, which makes it criminal for any person employed in any of the departments of the post office establishment, to open any letters "with which he shall be entrusted, or which shall have come to his possession, and which are intended to be conveyed by post." The allegation in the complaint was, that the defendant, being postmaster, had opened a letter which had come *to his possession* and was *intended to be conveyed by post*.

Ward, for the defendant, contended that the words "intended to be conveyed by post," in the 21st section, were to have some meaning; that they qualify what precedes, and show that there were some letters contemplated to come into the post office establishment, not to be conveyed by post; which could be no other than box letters, so called, that is, letters to be delivered in the place where they were lodged. He cited the 36th section, which provides that "for every letter lodged at any post office, not to be carried by post, but to be delivered at the place, where it is so lodged, the post master shall receive one cent of the person to whom it shall be delivered," and he contended that box letters were here expressly described as letters *not to be carried by post*. He further contended, that this was the only provision in the act for box letters being received into the post office; that no postage was imposed on them; that the 13th section, which prescribes the rates of postage, does not extend to them, and that the one cent received by the post master, under the 36th section, goes to his own use alone. He insisted further, that there was no evil intent in this case.

Dexter replied, that he did not contend there was any bad intention on the part of the prisoner; but he insisted that such intent was not necessary; that by the 21st section, the opening a letter was made criminal without reference to the intent or design; that opening a letter with intent to pry into business or secrets, or obstruct correspondence, was a distinct offence, so made by the 22d section, which he cited, and which makes it criminal, if any person "shall open any letter or packet which shall have been in a post office or in custody of a mail carrier, before it shall have been delivered to the person to whom it is directed, with a design to obstruct the correspondence, to pry into another's business or secrets." As to the other point, he argued that box letters came within the mischief intended to be guarded against in the 21st section, and ought, therefore, to come within the remedy and the sanction; that great evils would arise, if they were not thus included: and that they might be deemed letters intended to be conveyed by post, although the 36th section describes them as letters, not to be carried by post, because there was a distinction between *conveyed* by post and *carried* by post.

SPRAGUE J. delivered his opinion very briefly, observing that the complaint was founded wholly upon the 21st section. No offence under the 22d section was charged, or presented for his consideration. The complaint alleged, that the letter in question was intended to be conveyed by post: this allegation followed the language of the statute, and was admitted to be essential to constitute the offence charged. It would seem, that the language was intended, as some qualification of the terms which preceded it, and contemplated two classes of letters as coming to the possession of the post master; one to be conveyed by post, and the other not to be so conveyed. What letters were embraced in the latter class? The same statute in the 36th section said, that letters to be delivered in the place where they were lodged, were letters "not to be carried by post." Thus the law itself defined and described certain letters as not to be carried by post; but it was insisted, that there was a distinction between the words "carried" and "conveyed," and that box letters were to be *conveyed* by post, although not to be *carried* by post within the meaning of the law. The whole question, then, presented for the consideration of the court, was, whether there was such a distinction, between *conveyed* by post, and *carried* by post, as to be the foundation of a crime; for it was only on this distinction, that the complaint was attempted to be maintained. He thought, as the law itself had placed box letters in the class *not to be carried by post*, it would be refining too much to consider them still as belonging to the class *to be conveyed by post*, that he could not build up a crime upon a distinction so nice and critical, and he must, therefore, discharge the defendant.

He suggested further, that a doubt might arise, whether such a missive as this, being mere scrawls and incoherent nonsense, without signature, would be within the protection of the penalties of the law, it being really no communication, but a fraud upon the person to whom addressed and upon the post office department, tending to prejudice the government. But he suggested this point only as a matter of inquiry, upon which he had formed no opinion.

Supreme Judicial Court, Maine, June Term, 1841, *at Bangor.*

ROBERTS *v.* MARSTON.

Construction of a written contract.

THIS was assumpsit on certain notes of hand. For a portion of the amount claimed, the defendant offered to be defaulted. In relation to the balance, he relied upon the following receipt in payment, viz:

"Received of George F. Marston, this day, a warranty deed of two parcels of land situate on Union street, for which I agree and promise to pay or allow him the sum of four thousand dollars, with interest from this date, on the demands I now hold against him, when he shall have cleared the incumbrances on said deeded property above-mentioned, which incumbrances are to be cleared before the first of July next. Bangor, December 20, 1836. Amos M. Roberts."

At the time of the conveyance and when the receipt was given, the land was heavily incumbered by mortgages. These were not discharged until a day or two before the trial of the action, at the October term, 1839. At the trial, the plaintiff tendered to the defendant a deed of the premises, and contended, that the receipt being conditional, and the condition not having been complied with, the receipt was void. The defendant, on the contrary, contended, that the clearing off of the incumbrances was not a condition precedent, but a part of the contract, for the non-performance of which he was liable in damages. This question of construction was submitted to the court by agreement.

Rogers for the plaintiff.

McCrillis for the defendant.

Weston C. J. delivered the opinion of the court, to the effect, that the defendant was entitled to have the amount of the receipt allowed, after deducting such sum from the amount specified in it, as the jury might find the plaintiff damnified by a non-performance of the agreement, according to the letter of it.

French v. Camp and another.

The public have the same right to travel on the ice of a navigable river as a highway, that they have to the waters of the river.

The public having appropriated a tract on the ice of such a river for a road or travelled way, any person who wantonly or carelessly obstructs the same, or cuts a hole therein, is liable for any damages, which his act may occasion to any individual passing in such track.

This was a special action of the case brought to recover the value of a horse belonging to the plaintiffs, which was alleged to have been drowned by means of the carelessness or fault of the defendants. During the winter of the year 1837, a road had been travelled on the ice from Bangor to Eddington, over navigable waters, which had been used by travellers generally, who had occasion to pass in that direction. Such a road had been maintained for a long term of years previously, during the winter months, and while the ice was of sufficient strength, though the location of the path varied at different times between the two *termini*. At the time mentioned, in 1837, and after the road had become well defined by the travel upon it, the defend-

ants cut a hole for the purpose of taking the ice away for summer use, which extended so near the road as to encroach upon its limits. The plaintiff, during the night, and in the exercise of a reasonable degree of caution, while travelling the road, was accidentally precipitated into the hole thus cut, and his horse was drowned. To recover damages for the loss, this action was brought.

A verdict having been returned for the plaintiff under this state of facts by the instructions of the court, the defendant excepted; and the case was argued at the June term, 1840, by *John Appleton*, for the defendant, and by *McCrillis*, for the plaintiff.

Weston C. J. delivered the opinion of the court at this term, to the effect, that the waters of the Penobscot River are of common right as a highway for the public, while in a free or unfrozen state, and equally so, while in a congealed state; that the public having appropriated a portion or tract of the surface for a travelled path, the defendant had no right to interfere with the rights which the public had acquired by the previous appropriation, however good a right he might have to take ice from other places on the river. It appearing in this case, that the plaintiff was in the exercise of a reasonable degree of care and caution in travelling where he did, and that the defendant was guilty of a culpable carelessness in cutting where he did, knowing of the previous appropriation by the public, he was liable for whatever damages that carelessness had occasioned to the plaintiff.

Judgment on the verdict.

Bussey v. Luce.

Where a demandant claims under a deed with exceptions, the *onus probandi* is on him to show, that the demanded premises are not within the exceptions.

This was a writ of entry in which the demandant claimed a parcel of land in Hermon. To support his action, he read a deed of the whole town of Hermon, dated October 16, 1804, in which was this exception, namely: "excepting out of this conveyance one hundred acres to each settler within said township, meaning to except from this conveyance the lots of the settlers within the aforegranted township, as confirmed to the said settlers by the honorable, the general court." The demandant having closed his case, the tenant moved that he should be nonsuit on the ground, that, as the deed introduced contained exceptions, it devolved on the demandant to show that his claim did not come within them. No evidence was introduced by either party on this point, and *Emery J.* ordered a nonsuit with the agreement, "that if upon these facts the plaintiff is entitled to maintain his action the nonsuit should be taken off, otherwise the nonsuit to stand."

The action was tried at the October term, 1839, and was argued at the June term, 1840.

Rogers and *A. W. Paine*, for the demandant, contended, that the *onus probandi* was on the tenant because he had the affirmative of the issue; because it was for the interest of the tenant to prove the facts relied upon; and because the facts of confirmation were peculiarly within his knowledge if they existed.

John Appleton for the tenant.

Weston C. J. delivered the opinion of the court, to the effect, that the demandant must prove his title before he could recover, that having introduced no other evidence than the deed, without showing the demanded premises to be not within the exceptions, he had failed to show any seisin of them and therefore had failed to support his action.

Nonsuit confirmed.

Bussey *v.* Grant.

This case was brought to recover another portion of the same tract of land, a part of which was demanded in the above action. In addition to the deed introduced in the former case the demandant read the land resolves of the commonwealth of Massachusetts, dated June 25, 1789, defining the term "settler" and also the resolves of 1797, passed for the purpose of quieting settlers in the township of Hermon. By the provisions of the first resolve, a "settler" is defined to be one "who settled on the lot prior to 1st January, 1784"—"who went on for the purpose of cultivating the lot and making it the place of his actual abode," "and actually resided on said lot by himself or some person under him, and cleared fit for mowing and tillage at least one acre, and built a dwelling house thereon and continues to reside thereon." By the latter resolves it is provided, "that there is hereby released to each of the settlers in the township" of Hermon, "who settled on said township before January 1, 1784, to their heirs and assigns, 100 acres, on condition that each of them pay to the treasurer of the commonwealth $15,00," &c. The demandant also exhibited the plan of "settlers'" lots made by Delano in 1797, as run out for settlers, which plan show the demanded premises not within the bonds of any lot run out on the same.

The tenant, thereupon, introduced evidence to show, that the premises demanded were actually within the bounds of a settler's lot as run out for one Perkins, upon the face of the earth; but no evidence was introduced to show, that any of the acts of confirmation were ever performed by the settler or any one else in relation to the lot, nor did the tenant introduce any evidence to connect herself with the settler, but read a deed from one Pomroy to her husband, dated in 1821.

Hereupon the demandant requested the court to instruct the jury that to bring the Perkins lot within the exception, it must appear that

he was a settler within the terms of the resolve, and that his title had been confirmed to him by the commonwealth; that if he was a settler and entitled as such to a deed from the commonwealth, if his title was not confirmed to him, his lot was not within the exception. These instructions the judge refused, but instructed the jury that if Perkins was in the *occupation* of said lot when Delano made the plan in 1797, and that Delano made a survey upon the face of the earth corresponding to the limits claimed by the tenant in 1797, they would return a verdict for her. The jury found a verdict for the tenant, and the demandant excepted.

Rogers and *A. W. Paine*, for the demandant, contended, that the *onus probandi* was on the tenant to prove herself within the exception, and that she or her predecessors had complied with the provisions of the settler's resolve; that the instruction was wrong in fixing the year 1797, as the time when the settler should prove herself on the land, instead of 1784; that mere "occupation" was not sufficient, but that she should have proved the other requirements of the resolve; that the definition of settler, as fixed by the resolve of 1789, was applicable to the resolve of 1797, and to that under which the demandant claimed. They cited *Lambert* v. *Carr*, (9 Mass. 190). This case distinctly settles the law that the word "settlers" in all subsequent resolves should be taken with the definition as prescribed by the resolve of 1789.

John Appleton for the tenant.

Weston C. J. delivered the opinion of the court, to the effect that the demandant had failed to prove his seisin of the demanded premises, inasmuch as he had not proved them not to be within the exception in the deed, and that inasmuch as the resolve in favor of Gen. Knox, granting the township to the demandant's grantor, contained a provision, that "the *settlers* who had not been already quieted shall hereafter be quieted in such manner as the general court shall direct."[1] The lots of individuals in *occupation* of land at the time of the resolve being passed, were excepted from the operation of the deed to the demandant, whether confirmed to the settler or not.[2]

Judgment on the verdict.

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[1] No resolve of this kind was proved or offered in the case, nor alluded to in argument. Nor any evidence introduced to prove the tenant a "settler" under its provisions. Reporter.

[2] How shall a party prove negatively that the lot was not within the exception, when no evidence exists on the subject, no acts of confirmation ever having been performed? Reporter.

DIGEST OF AMERICAN CASES.

Selections from 7 McLean's (U. S. 7th Circuit) Reports.

BOND.

To constitute a bond at common law, it must be sealed by wax, wafer, or some tenacious substance; but in this country, except in two or three states, a scrawl has been substituted for a seal. *United States* v. *Stephenson and another*, 462.

2. A bond taken under an act of Congress is not governed by the law of the state where executed, but by the law of the United States. *Ib.*

CHANCERY.

Chancery will decree a contract to be rescinded, where a good title cannot be made, or where delays have occurred in making the title, and the land has become less valuable. *McKay* v. *Carrington*, 59.

2. Chancery will not decree damages on a failure to make a good title; but where the title cannot be made, it will decree a recision of the contract, the return of the purchase money and interest; and where there are outstanding negotiable notes, will also decree that they shall be delivered up. *Ib.*

3. A decree in Virginia for land in Kentucky cannot affect the title. *Carrington's heirs* v. *Brents and another*, 175.

4. A decree in Kentucky for the conveyance of land in Ohio cannot operate on the land. *Watts and another* v. *Waddle and another*, 202.

5. Courts of chancery will not interfere by injunction to prevent a threatened wrong, unless the danger is imminent, and the injury is irremediable in any other form. *Spooner* v. *McConnell and another*, 338.

6. The right set up by a complainant, as a citizen of the United States, to navigate certain waters, is an abstract right, and such an one as chancery cannot protect from violation. *Ib.*

7. Chancery does not deal with abstractions or contingencies, but with practical rights, and to prevent impending wrongs. *Ib.*

CONTRACT.

A contract to convey a tract of land so soon as a suit then pending for the title shall be decided, gives to the party that agrees to convey all the time necessary to close the litigation in all the forms it may assume. *Watts and another* v. *Waddle and another*, 202.

CORPORATION.

A corporation can exercise no powers but those which are specially given to it. *Lessee of Knowles* v. *Beatty*, 43.

2. A power to impose a tax for certain objects, and to meet "all other necessary expenses of the company," does not authorize the corporation in order to levy a tax, to pay a tax to the state. *Ib.*

3. The necessary expenses are those incurred by the corporation in the exercise of its granted powers. *Ib.*

DECREE.

A decree which purports to divest the legal title from one in whom it is not vested, can have no effect on the title. *Lessee of Harmer's heirs* v. *Gwynne*, 48.

EVIDENCE.

An instrument of thirty years' standing, not impeached, need not be proved by the subscribing witness. *Hinde and another* v. *Vattier and another*, 115.

2. An instrument of writing more than forty years old is not required to be proved with the same strictness as

one of modern date, unless there be facts and circumstances proved which create doubts as to its genuineness. *Waltons and heirs of Payne* v. *Coulson*. 124.

3. Bank notes, alleged to be enclosed in a letter stolen from the mail, need not be proved by a person who has seen the president and cashier write. *United States* v. *Keen*, 429.

4. Any one who deals in such notes, as cashiers of banks, &c., may prove their genuineness. *Ib.*

5. A check drawn on the bank and which circulates as money, may be proved in the same way. *Ib.*

6. Where the original corners and lines are established, they control courses and distances. But courses and distances govern where there are no established objects to control them. *Nelson's Lessee* v. *Hall and another*, 518.

7. Where in taking the acknowledgment of a deed, the justice omitted to state his official character, parol proof of his being a justice is admissible. *Shult's Lessee* v. *Moore*, 520.

8. The upsetting of a stage is *prima facie* evidence of negligence; and a passenger who has been injured need show nothing more to sustain his action. *McKinney* v. *Neil*, 540.

9. The proprietor is not responsible for casualties which could not be foreseen nor guarded against. *Ib.*

10. But he is liable for the smallest degree of negligence, want of care, or want of skill in the driver. *Ib.*

11. Want of skill in the driver, being a material fact in the case, may be proved as any other fact. *Ib.*

EXECUTION.

A law which regulates the issuing of executions on judgments previously rendered, affects the remedy and not the contract. *Bank of the United States* v. *Longworth*, 40.

EXECUTORS AND ADMINISTRATORS.

An executor who is empowered by the will to sell and convey the real estate of his testator, "in such mode as in his judgment shall be best, for the interest of the estate," cannot delegate to another the power to sell. *Pearson* v. *Jamison*, 199.

FEDERAL GOVERNMENT.

Under the power to regulate commerce with the Indian tribes, congress have power to prohibit all intercourse with them, except under a license. *United States* v. *Cisna*, 257.

INDORSER AND INDORSEE.

Notice left with a fellow boarder of the indorser with a request to hand it to him, sufficient. *Bank United States* v. *Hatch*, 92.

2. The indorser of a negotiable note which was made and assigned in Ohio, and was payable there, is liable, at the suit of the indorsee, in the state of Indiana, on proof of demand of payment of the maker, when the note became due, and notice to the indorser. *Burrows, Hall & Co.* v. *Hannegan*, 315.

3. The law of Indiana which requires a suit against the maker before recourse can be had against the indorser, does not govern the case. *Ib.*

POLICY OF INSURANCE.

Where fire is one of the enumerated risks in a policy on a steamboat, &c., a loss by fire will charge the underwriters, though occasioned by the negligence of the officers or crew. *Waters* v. *The Merchants' Louisville Insurance Company*, 275.

2. If the negligence be so gross as to authorize the presumption of fraud, which would constitute barratry, the underwriters are not liable, unless the policy expressly insures against barratry. *Ib.*

3. A policy against fire on land will, in the event of loss, hold the underwriters liable, though the fire was the result of negligence by servants and others.

POSSESSION.

Possession under a deed extends to the whole tract, if there be no adverse possession. *Ellicott & Meredith* v. *Pearl*, 214.

2. A tenant put into the possession by the grantee without definite boundaries, will be held to be in possession to the extent of the tract. *Ib.*

3. Possession without claim of title is limited to the actual occupancy. *Ib.*

4. To constitute possession there must be such an occupancy by exercising acts of ownership over the land, enjoying the profits, &c. as to give notice to the public and all concerned of the claim. *Lessee of Ewing* v. *Burnet*, 265.

INTELLIGENCE AND MISCELLANY.

THE POST OFFICE LAW AND JUDGE SPRAGUE'S DECISION. The decision of Judge Sprague, in the case of the *United States* v. *Oliver*, which may be found on page 197 of our present number, has excited much comment. Perhaps the learned judge might well have declined the responsibility of making a decision in the case on a preliminary examination, and sent the defendant to the higher court, a *prima facie* case having been made out against him. We have received the following communication on the subject, in which the decision is ably defended: —

There has been much animadversion on this case in the newspapers, and we think with little regard to the terms of the statute, or the general principles on which rest the proper administration of the law, and the safety of the citizen. The safety of every citizen depends on the great rule, that courts of law shall administer the statutes as the legislature has enacted them; otherwise the varying opinions, the whims or tyranny of judges would mete the measure of every man's justice, and the statutes would be no restraint on judicial officers, and no protection to the accused; every man's "property, liberty and life" would be at the mercy of judge-made law, — unknown, till its sentence was incurred and announced for execution. The principle is as well established in law as in humanity, that a penal statute shall be construed strictly, and that the court shall not, by construction, extend the operation of the act beyond the limits which the legislature have fixed by its letter. The animadversions to which we have alluded, adopt two assumptions. The first is, that the acquittal of the postmaster resulted from a nice verbal distinction and refinement, adopted by the court; but the fact is, that it resulted from the refusal of the court to adopt such a distinction, on which the complaint rested, and which would have extended the operation of the statute beyond its words, according to their ordinary meaning, and their use in every other section of the statute in which they occur.

The complaint rested only on the distinction taken between "*carried*" and "*conveyed*." In ordinary usage these two words mean the same thing, and in the 1st, 2d, 4th, 5th, 6th, 10th, 13th, 27th and 30th sections of the statute they are used in their common acceptation, and as synonymous, and this the derivation of the words authorizes; so that between the two words, there is no ordinary, legal or derivative distinction, and the dictionary defines each by the other. Was the judge to originate the distinction, and, by a verbal refinement between "carried" and "conveyed" extend a penal statute beyond its often repeated terms, and make an offence by construction? How far may a judge go in deflecting language from its common and ordinary meaning, and from the meaning every where else attached to it by the legislature? May he, by construction, stretch the act to every case that he may suppose to come within the mischief? If so, what security has any man against condemnation for an act, which no language of the law, in its ordinary meaning, has described as an offence? Every citizen is secured by the constitution against *ex post facto* laws of the legislature, but what is to secure him from these *ex post facto* laws of the court. His only security is in confining the courts to the fair and usual meaning of

language, except where the legislature itself has plainly indicated that it is used in a different sense: and if a case occur, of which the mischief is not within the act, the remedy must be applied by the legislature alone.

On these rules rests the wisest judicial administration of the land. Some time since, congress imposed a duty on "loaf sugar;" to evade the duty, crushed sugar was imported, which had not the form of loaf sugar, but in every other respect, was the same article. The question was brought before the United States court, whether crushed sugar was subject to the duty; here was a case manifestly within the policy of the statute, and the mischief it was intended to prevent, and, moreover, of manifest and mere evasion of the law, seeking to defraud the government of its proper revenue, and to prevent the protection extended to sugar refiners; yet the court did not feel at liberty to depart from the usual meaning of the words "loaf sugar" used in the statute, nor by construction to extend it beyond its letter to a case clearly within its policy, and thus crushed sugar was held to be not within the act: yet who, in that well known case, censured the court because they did not depart from the established rules of legal construction, to cover the clear mischief of that particular case.

The second assumption is, that, by the decision of the district court, box letters are excluded from the protection of the post office act; but all that the court decided, was, that box letters were not within the words and penalties of the 21st section of the act, which is confined by express terms to "*letters intended to be conveyed by post.*" But box letters are within the terms and the protection and penalties of the 22d section, which extends to all letters, which have been in any post office, whether intended to be conveyed by post or not, and which imposes a penalty, differing from that in the 21st section, on all persons opening such letters. The 22d section requires, to constitute the offence, a design to obstruct the correspondence, or pry into the secrets or business of another; and the facts in this case negatived such design: the 21st section, therefore, was the only one on which the complaint could be founded, and as the circumstances of the case made its judicial consideration most proper, the manner of its presentment fulfilled all that was due to the law and to the accused.

It has been most singularly contended, that the decision excludes from the protection of the act "all letters which have reached their destination." Now the decision is confined to box letters, and no others are within the 36th section, or its description of "letters lodged to be delivered" and "not to be carried by post;" all letters put into a post office, as letters intended to be conveyed by post, are of that class and name, and as such, would come to the possession of the postmaster, and be within the 21st section. The whole extent of the decision is merely this, that as the statute distinguishes between letters intended, and those not intended to be conveyed by post, the penalty confined by the terms of the statute to one class, cannot be extended to the other, by adopting a nice distinction and over refinement of terms, countenanced neither by common or legislative use. L.

Hilliard on Sales. Perhaps we ought to be ashamed to say, that we have never yet found an opportunity to give a careful examination to Mr. Hilliard's "Abridgment of the American Law of Real Property." Of that work, therefore, we can only inform such of our readers as may be in like condition with ourselves, that Chancellor Kent, in the fourth edition of his Commentaries, Vol. II., page 635, *note*, says, "I take this occasion to observe, that this work is one of great labor and intrinsic value." From an examination of the Treatise on the Law of Sales of Personal Property, published recently, we are disposed to believe it merits the same commendation. It is similar *in plan* to the author's former work, and contains a very full and well arranged digest of the decisions, English and American, on an important title of the law. We are confident that the profession will find that this book will enable them, better than any other that has yet been published, to find what has been adjudged, recently and of old, on the subject of which it treats. M.

MONTHLY LIST OF INSOLVENTS.

Boston.
Brooks, Franklin, Trader.
Call, Abraham, } Tailors.
Call, A. Augustus. } Copartners.
Cushing, Abel, Jr. Merchant.
Churchill, William, Fish dealer.
Dexter, George J. Police Officer.
Currier, William, Tailor.
Harwood, George W. Trader.
Homer, Gilman, } Pile drivers.
Morris, Robert R. } Copartners.
Knight, Edward, Trader.
Learned, Henry, Merch. Clerk.
Meder, Samuel A. Grocer.
Rogers, John W. H. Painter.
Skinner, Isaac B. Merch. tailor.
Stone, Elisha W. } Merchants.
Smith, Willard M. } Copartners.
Tewksbury, William, Jr.

Charlestown.
Littlefield, James, Brickmaker.

Danvers.
Lord, Caleb, Victualler.

Enfield.
Downing, Frederic.

Hanson.
Perry, Isaiah S. } Traders.
Josselyn, Elbridge, (of Lowell). } Copartners.

Ipswich.
Jewett, John, Trader.

Lee.
Smith, Edward, Gentleman.

Lowell.
Josselyn, Elbridge, } Traders.
Perry, Isaiah S. (of Hanson). } Copartners.
Fuller, Porter, Laborer.
Sawyer, Samuel, Physician.

Marblehead.
Stevens, Benjamin, Baker.

Milbury.
Sweetser, George, Carpenter.

New Bedford.
Hewit, Lewis S. } Bakers.
Pope, Isaiah P. } Copartners.
Russell, Holder.

New Marlborough.
McAlpin, James.

Nantucket.
Heaton, Tertius, Trader.

Townsend.
Brooks, Abner, Cooper.

Westborough.
Phillips, Daniel, Jr.

West Stockbridge.
Boynton, Henry B. } Traders.
Boynton, Charles B. } Copartners.

Woburn.
Newhall, Alfred A. Cordwainer.

Worcester.
Shaw, William M. Paper hanger.
Tead, Nathaniel, Hatter.

TO READERS AND CORRESPONDENTS.

A large portion of our present number is devoted to an examination of the McLeod case. The importance of the subject and the singular position of the whole controversy render such an examination desirable, and we hope the one we have given will be acceptable to our readers. The English papers, received by late arrivals, comment upon the decision of the supreme court of New York with considerable asperity. They are particularly severe upon the manner and style of the opinion of the court, and remark that it is drawn up in great haste, and presents the loose and slovenly appearance of a school-boy production, rather than the legal determination of a dignified judicial tribunal.

We are obliged to defer several articles which were prepared for the present number. Among them, are opinions by Mr. Justice Story, Mr. Chief Justice Gibson, and several decisions by the state courts in Massachusetts and Maine.

In the last decision we received from Pennsylvania, the *name of the case* was not given.

Our New England readers will be glad to learn, that L. S. Cushing, Esq., has prepared a second edition of his Treatise on the Trustee Process, revised and adapted to the new legislation of Massachusetts and Maine.

Little and Brown, of Boston, have in press the first volume of a new collection of American Criminal Trials.

We shall probably reprint the new Bankrupt Bill in our next number.